

Hamzah bin Osman v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO
05–68–03 OF 2016 (A)
HASAN LAH, ZAINUN ALI, RAMLY ALI, PRASAD ABRAHAM AND
JEFFERY TAN FCJJ
18 JULY 2017

Criminal Procedure — Appeal — Appeal against conviction and sentence — High Court convicted appellant under s 302 of the Penal Code and sentenced appellant to death — Court of Appeal upheld High Court's decision — Whether there was non-compliance of ss 342 and 343 of the Criminal Procedure Code ('the CPC') — Whether ss 342 and 343 of the CPC were directory or mandatory — Whether prejudice to appellant for non-compliance of ss 342 and 343 of the CPC

The appellant was charged in the High Court under s 302 of the Penal Code and at the end of the trial, the High Court convicted and sentenced the appellant to death. The Court of Appeal upheld the said decisions, hence the present appeal. In the present case, it was not disputed that there was an absence of a certificate by the medical director, and that the respondent relied on an oral assertion in court that the appellant was of sound mind and capable of making his defence based on the medical report the respondent had sight of. The appellant's case was that the non-compliance with ss 342 and 343 of the Criminal Procedure Code ('the CPC') rendered the proceedings a nullity and a retrial of the same. In this regard, the respondent submitted that the said provisions were directory in effect and no prejudice had been occasioned to the appellant. The gist of the case was in relation to the concept of fitness to plead, or fitness to stand trial, fitness to be tried and fitness to make defence which was the phraseology in ss 342 and/or 343 of the CPC, but which terms were used interchangeably.

Held, allowing the appeal and remitting back the matter to the High Court for retrial:

- (1) Based on the evidence, no certificate of the medical director was forthcoming nor was the same produced and/or tendered in the court. Apart for an oral assertion by the respondent which tantamounted to a statement from the BAR table at the highest, there was clearly non-compliance with s 324(1) of the CPC. The soundness or otherwise of the appellant to plead remained unresolved as the basis for the finding must be the certificate to state whether the appellant was fit to stand trial,

- A although the medical director needed not be present in the court to tender the same his certificate would be admissible. Since there was non-compliance of s 343(1) of the CPC after a reference was made by the High Court under s 342(1) of the CPC, the proceeding with the trial as was done in the present case by the High Court rendered the trial a nullity (see para 9).
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- (2) The statutory injunctions in ss 342(1) and 343 of the CPC were sacrosanct to the fundamental right of the appellant in our criminal justice system to avail himself of the right to ensure that he was in law fit to plead and understand the consequence of proceedings against the appellant. These were mandatory provisions and non-compliance with the same would rendered a trial a nullity as in the instant case and under those circumstances the Court of Appeal misdirected itself in considering prejudice in the instant appeal where there had be non-compliance of the said section (see para 10).
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[Bahasa Malaysia summary]

- E Perayu telah dituduh di Mahkamah Tinggi di bawah s 302 Kanun Keseksaan dan di akhir perbicaraan, Mahkamah Tinggi telah mensabitkan dan menjatuhkan hukuman mati ke atas perayu. Mahkamah Rayuan telah mengekalkan keputusan-keputusan tersebut justeru rayuan ini. Dalam kes ini, ia tidak dipertikaikan bahawa terdapat ketiadaan pengesahan oleh pengarah perubatan, dan bahawa responden bergantung kepada penegasan lisan di mahkamah bahawa perayu berfikir waras dan berupaya membuat pembelaannya berdasarkan laporan perubatan yang dilihat oleh responden.
- F Kes perayu adalah kerana ketidakpatuhan ss 342 dan 343 Kanun Tatacara Jenayah ('KTJ') yang menyebabkan prosiding terbatal dan satu perbicaraan semula yang sama. Sehubungan itu, responden berhujah bahawa peruntukan-peruntukan tersebut adalah bersifat arahan dan tiada prejudis berlaku kepada perayu. Ringkasan kes adalah berkenaan konsep kecerdasan untuk pli, atau kecerdasan perbicaraan, kecerdasan untuk dibicarakan dan kecerdasan untuk membuat pembelaan sepertimana dinyatakan dalam ss 342 dan/atau 343 KTJ, namun begitu terma-terma tersebut digunakan silih berganti.
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- H **Diputuskan,** membenarkan rayuan dan meremitkan perkara itu kepada Mahkamah Tinggi untuk dibicarakan semula:
- (1) Berdasarkan keterangan, tiada pengesahan tentang pengarah perubatan itu dikemukakan atau yang sama dikemukakan dan/atau ditenderkan di mahkamah. Selain daripada penegasan lisan oleh responden yang sama seperti kenyataan daripada jadual BAR paling tinggi, adalah jelas terdapat ketidakpatuhan dengan s 324(1) KTJ. Kewarasan perayu atau sebaliknya untuk mempli masih tidak selesai kerana asas untuk penemuan perlulah pengesahan untuk mengatakan sama ada perayu
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sihat untuk perbicaraan, meskipun pengarah perubatan tidak perlu hadir di mahkamah untuk menenderkan yang sama pengesahannya boleh diterima. Oleh kerana terdapat ketidakpatuhan s 343(1) KTJ selepas rujukan dibuat oleh Mahkamah Tinggi di bawah s 342(1) KTJ, prosiding dengan perbicaraan sepertimana dilakukan dalam kes ini oleh Mahkamah Tinggi menyebabkan perbicaraan tersebut terbatal (lihat perenggan 9).

- (2) Injunksi-injunksi statutori dalam ss 342(1) dan 343 KTJ penting kepada hak asas perayu dalam sistem keadilan jenayah untuk memanfaatkan dirinya tentang hak untuk memastikan dari segi undang-undang dia sihat untuk mempli dan memahami akibat prosiding terhadap perayu. Berikut merupakan peruntukan-peruntukan mandatori dan ketidakpatuhan yang sama menyebabkan perbicaraan terbatal sepertimana dalam kes ini dan dalam keadaan tersebut Mahkamah Rayuan telah salah arah dalam mempertimbangkan prejudis dalam rayuan ini di mana terdapat ketidakpatuhan seksyen tersebut (lihat perenggan 10).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Kesavarajah v The Queen (1994) 181 CLR 230, HC (refd)
PP v Misbah bin Saat [1997] 3 MLJ 495, HC (refd)
Wong Ban Chong v PP [2015] 3 MLJ 849; [2015] 1 CLJ 640, CA (folld)

Legislation referred to

Criminal Procedure Code ss 324(1), 342, 342(1), (3), 343, 343(1), (3), 422
 Penal Code ss 302

Appeal from: Criminal Appeal No A-05–339–11 of 2015 (Court of Appeal, Putrajaya)

M Manoharan (M Manoharan & Co) for the appellant.
Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Prasad Abraham FCJ (delivering judgment of the court):

[1] The appellant was charged in the High Court under s 302 of the Penal Code and after trial, was convicted and sentenced to death (see p 6 AR Vol 2, the order of the High Court). The Court of Appeal upheld the conviction and

- A sentence of the High Court (see pp 5–6 AR Vol 1, the order of the Court of Appeal). The appellant’s appeal to this court was heard and disposed of on 23 March 2017 wherein we allowed the appeal and remitted the matter to the High Court to be retried.
- B [2] Our decision was grounded on the principal point raised by counsel for the appellant that there was non-compliance with the relevant provisions of ss 342 and 343 of the Criminal Procedure Code (Act 593) (‘the CPC’). To fully understand the arguments raised in this appeal we now set out the notes of evidence of the relevant portion of the trial in the court below ie pp 175–178
- C and pp 1–5 RR:
- 22.6.2011*
- TPR Puan Siti Fatimah Talib bagi pihak Pendakwaan.
- D Puan Manjeet Kaur bagi pihak OKT.
- OKT hadir.
- Kes untuk sebutan.
- E Puan Manjeet pohon agar OKT dihantar untuk pemerhatian di Hospital Mental di bawah seksyen 342(1) KTJ kerana ibu kepada tertuduh memaklumkan bahawa tertuduh sering mendengar suara dan juga dimaklumkan bahawa tertuduh telah beberapa kali cuba membunuh diri dalam penjara dan dikatakan mengalami tekanan jiwa tetapi tidak diberitahu samada keluarga OKT ada sakit mental.
- F Mahkamah telah menjalankan ujian menyoal tertuduh dan Mahkamah mendapati OKT tidak bekerjasama dan enggan menjawab soalan-soalan yang ditanya oleh Mahkamah.
- Mahkamah ini ingin mendapatkan pengesahan daripada pihak penjara tentang perkara cuba membunuh diri dalam penjara oleh OKT dan juga maklumat daripada pihak ibu OKT.
- G Mahkamah: Ke: 24.6.2011 (sebutan)
- 24.6.2011*
- TPR Puan Siti Fatimah Talib bagi pihak Pendakwaan.
- H Dato Naran Singh dan Puan Manjeet Kaur bagi pihak OKT.
- OKT hadir.
- Kes untuk sebutan.
- I Permohonan oleh pihak Pembelaan di bawah seksyen 342(1) KTJ Dato Naran Singh memaklumkan latar belakang OKT.
- Puan TPR menjawabnya.
- Ibu kepada OKT turut hadir, memaklumkan mengenai OKT dan latar belakang ahli keluarganya.

- Mahkamah: Permohonan peguambela dibenarkan. OKT dihantar ke Hospital Bahagia Ulu Kinta untuk pemerhatian selama 1 bulan dibawah seksyen 324(3) KTJ. **A**
- Tarikh bicara: 27.6.2011 hingga 1.7.2011
- 4.7.2011 hingga 8.7.2011 dilapangkan. **B**
- 22.7.2011 (sebutan) OTP dikeluarkan.
- 22.7.2011
- TPR Puan Noriah Osman menyebut bagi pihak TPR Puan Siti Fatimah Talib bagi pihak Pendakwaan. **C**
- Puan Manjeet Kaur bagi pihak OKT.
- OKT belum dikemukakan.
- Kes ditangguhkan sebentar. **D**
- Kes dipanggil semula.
- TPR Puan Noriah Osman bagi pihak TPR
- Puan Manjeet Kaur bagi pihak OKT.
- OKT hadir. **E**
- Kes untuk sebutan.
- TPR: Laporan Perubatan telah diterima dan mengesahkan OKT semasa kejadian beliau dalam keadaan waras dan buat masa ini keadaan mental beliau adalah stabil dan beliau layak untuk membela diri dan dibicarakan di Mahkamah. **F**
- Pertuduhan (P1) dibaca dan diterangkan kepada OKT dan jawab faham. Puan Manjeet pohon kes ini disebut pada 28.7.2011 di mana Dato Naran boleh hadir.
- Mahkamah: Ke 28.7.2011 (sebutan). OTP dikeluarkan. **G**
- [3]** From the notes of evidence, it is clear that the High Court exercised its powers under s 342(1), which we now set out:
- Chapter XXXIII
- PERSONS OF UNSOUND MIND **H**
- Procedure where accused is suspected to be of unsound mind 342.
- (1) When a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness. **I**

The High Court accordingly investigated the fact of such unsoundness of mind (see p 176 notes of evidence). Thereafter the High Court ordered the appellant

A under s 342(3) of the CPC to be remanded for observation at Hospital Bahagia Ulu Kinta, Perak.

B [4] Thereafter the respondent on 22 July 2011 informed the court that the medical reports had been received which confirmed that the appellant was fit to stand trial. Upon query from this court, the respondent's counsel confirmed that further the medical reports were never tendered, nor marked in court as an exhibit.

C [5] Counsel for the appellant argued before us, that there was been non-compliance with s 343(1) and (3) of the CPC which we now set out ie:

Certificate of Medical Director

D (1) If the Medical Director shall certify that the accused person is of sound mind and capable of making his defence the Judge or Magistrate shall proceed with the trial.

(3) The certificate of the Medical Director shall be receivable as evidence under this section.

E [6] In the instant case, it was not in dispute that there was an absence of a certificate by the Medical Director, and that the respondent relied on an oral assertion in court that the appellant was of sound mind and capable of making his defence based on the medical report the respondent had sight of. The bane of the appeal by the appellant is that non-compliance with the aforesaid sections of the CPC rendered the proceedings a nullity and a retrial of the same.

F [7] The respondent in their arguments attempted to persuade this court, that the said provisions were directory in effect and no prejudice had been occasioned to the appellant. We agreed with counsel for the appellant and ordered a retrial, setting aside the conviction and sentence and we append below our grounds for so doing.

OUR DECISION

H [8] It must be emphasised, that ss 342 and 343 of the CPC is concerned with the mental state of mind of the appellant *at the time of the plea*. These aforesaid sections afford protection to an accused who is suspected of being of unsound mind and would be incapable of understanding the nature of the charges against him and the meaning and import of evidence adduced against him. The 'raison d'être' of these sections is that the mental state of the accused renders him incapable of making his defence thereby reducing his presence at the proceedings to a nullity. These sections do not apply to a situation where the accused is going to rely on a plea of insanity as a defence at the time of the commission of the offence. In our instant case a plea of insanity was never raised by the appellant. To encapsulate, we are dealing with the concept of

fitness to plead, or fitness to stand trial, fitness to be tried and fitness to make defence which is the phraseology in ss 342 and/or 343 of the CPC, but which terms are used interchangeably (see *Kesavarajah v The Queen* (1994) 181 CLR 230 at p 232, NB p 234).

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[9] On the evidence, it is clear the High Court, after having investigated the fact of unsoundness of the appellant, exercised its powers under 342(3) and remanded the appellant for observation at Hospital Bahagia Tanjong Rambutan. We note from the notes that no certificate of the Medical Director was forth coming nor was the same produced and or tendered in court. Apart for an oral assertion by the respondent which tantamounted to a statement from the BAR table at the highest, there was clearly non-compliance with s 324(1) of the CPC. In our view, the soundness or otherwise of the appellant to plead remained unresolved as the basis for the finding must be the certificate to state whether the appellant was fit to stand trial, although the Medical Director needed not be present in court to tender the same his certificate would be admissible. Since there was non-compliance of s 343(1) of the CPC after a reference was made by the High Court under s 342(1) of the CPC, in our view proceeding with the trial as was done in this case by the High Court rendered the trial a nullity.

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[10] The Court of Appeal in its grounds of judgment dealt with the issue at paras 27–29 of their grounds appearing at pp 30, 34 and 40 of the same. The essence of the approach of the Court of Appeal was as the trial had proceeded in earnest, the issue of fitness to plead had been overtaken by circumstances and at any rate no prejudice had befallen the appellant. This was echoed by the respondents in their submissions before this court. We would hold that the statutory injunctions in s 342(1) and 343 of the CPC are sacrosanct to the fundamental right of the appellant in our Criminal Justice System to avail himself of the right to ensure that he is in law fit to plead and understand the consequence of proceedings against the appellant. These are mandatory provisions and non-compliance with the same would in our view render a trial a nullity as in our instant case and under those circumstances the Court of Appeal misdirected itself in considering prejudice in this instant appeal where there had be non-compliance of the said section.

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[11] We refer to an article written by Professor Molly Cheang published in Anglo American Law Review entitled *Fitness to Plead in Singapore & Malaysia and the Rationale* and which we agree with the author's views at p 209:

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The idea that persons of unsound mind should not be made to stand trial is one rooted in the age-old concept of fair play and fundamental justice. This 'fitness' principle is both the product of the basic fundamental right of an accused to defend himself and a logical extension of the common law rule which prohibits trials in absentia. An accused suffering from mental disability is obviously unable to take the stress

- A *of a court appearance. It is also better for the dignity of the legal process that he should not be compelled to stand trial whilst labouring under such a condition. Indeed, if the accused is unable to comprehend the proceedings and to contribute to his own defence, it would be unjust to convict him because if he were capable of following the trial he might be able to exculpate himself. Moreover, mental disability may substantially diminish an accused's capacity to testify, to recall exonerating circumstances or identify witnesses and so forth.* (Emphasis added.)
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- [12] This article was cited with approval by Visu Sinnadurai J in the case of *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495 at p 502 on the issue of fitness to plead, which we agree with the finding of the court in (2):
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- (2) An accused person who has recovered from his unsoundness of mind, and who is fit to stand trial, may choose not to raise the defence of insanity. In such a situation, neither the prosecution nor the judge could raise the issue of insanity during trial if the accused has not raised the defence. *The court's responsibility is only to ensure that the accused is fit to stand trial and a medical report would be relevant to assist the court in this finding. There is no need for the court to inquire into the issue as to whether the accused was insane in law at the time of commission of the offence. Therefore, the contention of the prosecution cannot be accepted* (see pp 508A–B, 510I and 511A); *R v Smith* [1979] 3 All ER 605, *R v Dickie* [1984] 3 All ER 173 and *PR v Zainal Abidin* [1993] 1 CLJ 147 followed; *PP v Nageswari Nagaratnam* [1994] 3 MLJ 463 not followed. (Emphasis added.)
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- [13] The Court of Appeal in *Wong Ban Chong v Public Prosecutor* [2015] 3 MLJ 849; [2015] 1 CLJ 640 dealt with specifically with the interpretation of ss 342 and 343 of the CPC and held:
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- (1) *The JC should have waited for the psychiatrist report issued by the medical director to certify whether or not the accused was of sound mind and capable of making his defence before proceeding to trial. In the absence of the certification, it was wrong for the JC to proceed with the trial, let alone convict the appellant of the offences charged.* (para 7)
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- (2) Making a finding as to the mental state of the accused is a mandatory requirement imposed on the trial judge or Magistrate under s 343(2) of the CPC, failing which would render the trial a nullity and not a mere irregularity curable under s. 422 of the CPC. (para 13). (Emphasis added.)
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I We agree with the finding of the Court of Appeal in this regard.

- [14] As a postscript, whilst it might be argued that non-compliance of these sections are a mere irregularity curable under s 422 of the CPC bearing in mind, the appellant had been convicted under s 302 of the Penal Code and the agony the family of the deceased would have to go through in the event of a retrial and the laborious process of a retrial and its practical difficulties, however the concept of fitness to plead as enshrined in ss 342 and 343 of the CPC is a basic fundamental right of the accused and breach of the same in our view
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cannot be whittled down by deeming such breaches as directory in nature rather than mandatory.

[15] We allowed the appeal and ordered the matter to be remitted back to the High Court for retrial. The appellant continued to be remanded.

Appeal allowed; case remitted back to High Court for retrial.

Reported by Dzulkarnain Ab Fatar

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